

FCC MAIL SECTION

Dec 2 1994
Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-136

In re Application of

ELLIS THOMPSON File No. 14261-CL-P-134-A-86
CORPORATION

For facilities in the Domestic
Public Cellular Radio
Telecommunications Service on
Frequency Block A in Market
No. 134, Atlantic City,
New Jersey

MEMORANDUM OPINION AND ORDER AND HEARING DESIGNATION ORDER

Adopted: November 18, 1994; Released: November 28, 1994

By the Commission:

I. INTRODUCTION

1. This memorandum opinion and order designates for hearing the application of Ellis Thompson Corporation (Thompson) to construct and operate a cellular telephone system. We find that there are substantial and material questions as to whether a third party became a real-party-in-interest in the Thompson application contrary to the Commission's rules.¹ We take this action "pursuant to a decision of the United States Court of Appeals for the District of Columbia Circuit reversing and remanding our prior order upholding the grant of Thompson's application. *Ellis Thompson Corp.*, 7 FCC Rcd 3932 (1992), *aff'd in part and rev'd in part sub nom. Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42 (D.C. Cir. 1994).

II. BACKGROUND

2. Thompson was selected by lottery to construct and operate a cellular telephone system on frequency Block A (the non-wireline block) in Atlantic City, New Jersey. It is wholly owned by Ellis Thompson, a now 77 year-old retired welder living in Vancouver, Washington. Pursuant to the terms of a settlement agreement among applicants for the Atlantic City authorization (the CMS Settlement Agreement), Thompson is entitled to a 50.01 percent ownership interest in the Atlantic City authorization, while other parties are entitled to a 49.99 percent interest.

3. Questions regarding the control of Thompson arise from agreements entered into by Thompson with two parties, Telephone and Data Systems, Inc. (TDS) and American Cellular Network Corporation (Amcell). Shortly after the lottery in 1986, Thompson entered into a letter agreement giving TDS an option to purchase Thompson's interest after the cellular system was completed. The agreement (as amended) provided, among other things, that TDS' approval was required for agreements calling for expenditures by Thompson of \$50,000 or more (paragraph 16 of the agreement).

4. In 1987, Amcell notified TDS that it had acquired a 36.01 percent interest in the Atlantic City authorization from the original minority parties to the CMS Settlement Agreement. Amcell informed TDS that, under a supermajority provision of the CMS Settlement Agreement (Section 3.4(b)), Amcell's consent was required before TDS could buy Thompson's interest.

5. Thompson thereafter entered into an agreement with Amcell under which Amcell would construct the Atlantic City system and operate it for at least ten years. In compliance with paragraph 16 of its agreement with TDS, Thompson submitted the management agreement for TDS' approval. TDS, however, refused to consent to the agreement.

6. Thompson, nevertheless, executed the management agreement with Amcell, and simultaneously, entered into two related agreements. Under the first, Thompson granted Amcell a contingent option to purchase its interest in the event that TDS did not exercise its purchase option. Under the second, Amcell agreed to indemnify Thompson if the Commission denied Thompson's application because it found the management agreement objectionable.

7. In pleadings before the Commission's Common Carrier Bureau, Amcell challenged the propriety of paragraph 16 of the TDS agreement, while TDS challenged Amcell's rights under Section 3.4(b) of the CMS Settlement Agreement. Each asserted that the other's provision violated 47 U.S.C. § 310(d), which requires Commission consent to transfers of control of a license or construction permit. The Bureau upheld Section 3.4(b) but required the abrogation of paragraph 16. *Ellis Thompson*, 3 FCC Rcd 3962 (Mob. S. Div. 1988), *aff'd*, 4 FCC Rcd 2599 (Com. Car. Bur. 1989).

8. On review before the Commission, TDS supplemented its allegations against Amcell. TDS asserted that the management agreement, contingent option agreement, and indemnification agreement, taken together, indicated that Amcell had acquired control of Thompson.

III. COMMISSION ORDER

9. The Commission evaluated the control issue using the criteria set forth in *Intermountain Microwave*, 24 RR 983 (1963). See also *Public Notice*, 1 FCC Rcd 3 (1986), providing guidance regarding questions of control based on *Intermountain*. The six factors are these:

(1) Does the licensee have unfettered use of all facilities and equipment?

¹ Under 47 C.F.R. § 22.13(a)(1), applicants are required to disclose all real-parties-in-interest. Under 47 C.F.R. § 22.23 substantial changes in the beneficial ownership or control of applicants for cellular authorizations may result in their dis-

missal. See also 47 C.F.R. §§ 22.31, 22.918. Moreover, under 47 U.S.C. § 310(d) and 47 C.F.R. § 22.39 control over a cellular authorizations cannot be transferred without Commission approval.

- (2) Who controls daily operations?
- (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- (4) Who is in charge of employment, supervision, and dismissal of personnel?
- (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating?; and
- (6) Who receives moneys and profits from the operation of the facilities?

1 FCC Rcd at 3.

10. The *Intermountain* factors represent the normal incidents of responsibility for the operation and control of a common carrier facility. 24 RR at 984. As such, they generally provide useful guidelines for evaluating real-party-in-interest and transfer of control questions. For example, in the *Public Notice* cited above, the Commission explicitly adopted the *Intermountain* criteria as guidelines for questions arising from the use by cellular operators of management companies. We stress, however, that there is no exact formula for determining control and that questions of control turn on the specific circumstances of the case. See *Data Transmission Co.*, 44 FCC 2d 935, 936 (1974). Thus, in applying the *Intermountain* criteria, we examine the totality of the circumstances.

11. The Commission's analysis was as follows:

Use of the facilities. Except for the shared Amcell switch, [Thompson] owns all the cellular equipment utilized in the Atlantic City system and is the lessee for all of the cell sites. Mr. Thompson also has access to the shared switch. Thus, it is clear that [Thompson], the licensee, has unfettered access to the system's facilities and equipment. Indeed, Mr. Thompson makes regular visits to the system. *Day-to-Day Operations.* While Amcell does manage day-to-day operations, such operations are subject to Mr. Thompson's ultimate supervision and control. Mr. Thompson approves the annual budget and major expenditures, receives periodic reports detailing the status of operations and maintains regular contact with the Amcell management team. [footnote omitted] *Policy Decisions.* Mr. Thompson is involved in making all major policy decisions and meets quarterly with Amcell management to discuss all aspects of the business over the past quarter and to discuss marketing and construction plans for the current quarter. While Amcell prepares FCC applications, they are reviewed by Mr. Thompson's independent FCC counsel, signed by Mr. Thompson and filed by his counsel. *Personnel Responsibilities.* Mr. Thompson is [Thompson's] only employee and determines his own salary, which is paid by [Thompson]. Although Amcell is [Thompson's] system manager and is thus responsible for hiring, firing and supervising personnel on a daily basis, Amcell itself is subject to

dismissal for cause by [Thompson], which thus has the ultimate responsibility for personnel management. *Financial Obligations.* [Thompson] is financially responsible for the construction and operation of the Atlantic City cellular system. [Thompson] is liable on the loan from Provident Bank which has been used to meet the financial needs of the system. [footnote omitted] Moreover, while Amcell has authority to make payments on behalf of [Thompson] for operating expenses, Mr. Thompson must approve the annual budget for the system, any proposed expenditures outside the scope of the annual budget, and all checks in excess of \$5,000, except for certain recurring payments for which the limit is \$25,000. *Receipt of Monies.* All funds derived from operation of the cellular system are deposited directly into [Thompson's] separate bank account, to which Mr. Thompson has full access, and Amcell's management fees are paid out of that account. As majority owner, Mr. Thompson is ultimately entitled to 50.01 percent of the cellular system's proceeds. During the second quarterly meeting of 1990, Mr. Thompson ordered a cash distribution of system profits to the system's owners, commensurate with their respective interests.

7 FCC Rcd at 3935 ¶ 15. The Commission expressed concern that Amcell's undertaking to indemnify Thompson if the license is revoked would encourage a lax attitude on the part of the licensee. Nevertheless, the Commission found that a preponderance of the facts and circumstances indicated that there were no substantial and material questions of fact suggesting that Thompson had relinquished control. *Id.* at 3936 n.19.

IV. COURT OF APPEALS

12. On March 25, 1994, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded. The court ruled that the Commission's application of the *Intermountain* factors was inconsistent with precedent in that the Commission, without explanation, treated them as a test of legal, rather than of *de facto*, control.

13. Reviewing the first four *Intermountain* factors, the court faulted the Commission for: (1) equating Thompson's "access" to the facilities it shares with Amcell with "use" of those facilities; (2) treating approval of major expenses and "contact" with Amcell management as "control of daily operations"; (3) considering "involvement" in major policy decisions as being the equivalent of "determining and carrying out" policy decisions; and (4) equating Thompson's right to nullify Amcell's personnel decisions with control over hiring and firing. The court was particularly troubled by a perceived inconsistency between the Commission's analysis of the control issue in this case and that in *La Star Cellular Telephone Co.*, 5 FCC Rcd 3286 (I.D. 1990), *aff'd*, 7 FCC Rcd 3762 (1992), and other cases.²

14. Following remand the parties were invited to comment on what further action should be taken. *Ellis Thompson Corp.*, 9 FCC Rcd 1888 (G.C. 1994).6X]Z³

² The court vacated and remanded the Commission's *La Star* decision for further consideration. *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994). We have today

adopted a further order in the *La Star* proceeding. *La Star Cellular Telephone Co.*, FCC 94- ().

³ Before the Commission are: (1) comments, filed May 5, 1994,

V. COMMENTS

15. TDS contends that, in view of the court's opinion, the Commission cannot find that Thompson has *de facto* control over the cellular system. TDS argues that the Commission should order Amcell to divest its interest in the system and to abrogate Section 3.4(b). Thompson and Amcell respond that TDS' analysis represents an unduly mechanical application of the *Intermountain* criteria. They and PCC⁴ argue that the Commission should take into account the realities of modern cellular telephone system operation in applying the *Intermountain* criteria. Specifically, they maintain that it is unrealistic to expect that Thompson will run the Atlantic City system as a "mom-and-pop" operation. Rather, these parties argue that the fact the Atlantic City system is a turnkey operation and a part of a regionally integrated system merely reflects current realities and should not be held against Thompson.

VI. ISSUE ANALYSIS

A. THE INTERMOUNTAIN FACTORS

16. We now turn to the specific *Intermountain* factors. We evaluate these factors bearing in mind the court's admonition that we must evaluate them in terms of actual and not theoretical control.

1. Use of the Facilities

17. *Comments.* Thompson and Amcell assert that Thompson owns all of the radio equipment associated with the cellular system and is the lessee of all of the cell sites.⁵ They acknowledge that Thompson does not own the system's MTSO, which is owned by Amcell and is used in connection with Amcell's Wilmington, Delaware cellular system. They insist, however, that the sharing of switching facilities has been acknowledged by the Commission as a common attribute of cellular operation and does not reflect a lack of control. Moreover, they contend that appropriate control is also indicated by Thompson's free access to the switching facilities.

18. TDS argues that the common use of switching facilities by the Atlantic City system and Amcell's Wilmington system indicates an intention that the Atlantic City system be totally merged into Amcell's regional operations. TDS also argues that the court has ruled out treating Thompson's access to the switching facilities as an indication of control.

19. *Discussion.* The technical compatibility and capacity to integrate the Atlantic City system and Amcell's own cellular operations appears to be a key feature of the Thompson-Amcell relationship and appears to have potential impact on Thompson's unfettered use of the facilities. According to a description attached to the Thompson-Amcell management agreement, the Atlantic City system was designed to be "automatically" part of the "wide area Delaware Valley non wireline cellular system," which includes Amcell's Wilmington system and a Philadelphia, Pennsylvania system owned by Amcell's parent corporation. See Management Agreement, dated December 30, 1987, Schedule A "Outline System Configuration" at 2. The description indicates that technology used by the Amcell-related systems enables the Atlantic City system to be fully integrated with the other operations without additional hardware, software, or communications links. *Id.* This circumstance might reflect valid technical and financial advantages for Thompson and be consistent with Thompson's retention of unfettered use. It is also possible, however, depending on the totality of the circumstances, that the arrangement might reflect an intent for Amcell to exercise control over an integrated operation contrary to Thompson's unfettered use of the facilities. Thompson's reported access to the facilities does not address questions raised by the apparent importance given by the parties to the integration of the Atlantic City and Amcell-related systems. Nor does it indicate compliance with the "use" requirement of *Intermountain*. The evidence does not indicate that, as part of his access to the MTSO, Mr. Thompson is authorized to operate or otherwise use those facilities.

2. Day-to-Day Operations

20. *Comments.* Thompson and Amcell acknowledge that, under their management agreement, Amcell will oversee the day-to-day operations of the Atlantic City system. They assert, however, that this arrangement reflects a valid delegation of authority and that Thompson retains ultimate control over operations. They assert that: (1) Thompson conducts quarterly visits to the facilities and to Amcell's offices and maintains regular contact with Amcell management; (2) purchase orders, checks, and other documents requiring Thompson's approval are sent to an independent attorney for review; (3) Thompson approves the annual budget; (4) Thompson signs checks for non-recurring expenditures over \$5,000 and all payments to Amcell and receives back-up information; and (5) Thompson reviews and approves all major contracts. They also submit that the

by Thompson, Amcell, TDS, and PCC Management Corporation (PCC); and (2) reply comments, filed May 12, 1994, by Thompson and Amcell, and May 17, 1994, by TDS. We note that TDS is a party both to this proceeding and *La Star*. PCC is not a party to this proceeding or to *La Star*. We accept its comments as an *amicus*. The Common Carrier Bureau did not file comments in this proceeding and did not participate in the preparation of this order.

⁴ PCC proposes that the Commission should update the applicability of the *Intermountain* criteria and approve "safe harbor" provisions for agreements between cellular licensees and management companies. Without here considering whether a general policy review in this area is warranted, none of PCC's specific proposals would justify a different outcome in this proceeding. In particular, we cannot, on the record of this case,

rely on the parties' formal agreements alone, as PCC proposes in some situations, to make a meaningful assessment of *de facto* control. Nor would the adoption of PCC's suggested safe harbor provisions change the analysis here. Moreover, to the extent that the parties and PCC have called to our attention information about the current realities of cellular telephony, we have incorporated that information in our analysis. Such realities cannot, of course, change the requirements of Section 310(d).

⁵ The service area of a cellular telephone system is divided into "cells." Users' mobile radio equipment communicates with a base station within the cell in which the user is located. The base stations are connected by land line to a mobile telephone switching office (MTSO), which is connected, in turn, to a switching office of the local telephone network.

management agreement is subject to an implied covenant which would permit Thompson to terminate the agreement for cause.

21. TDS questions whether Thompson maintains control over day-to-day operations. TDS contends that Thompson has no right to terminate Amcell's management for 20 years. TDS also notes that Mr. Thompson lives in Washington State, far from Atlantic City.

22. *Discussion.* We find that provisions of the management agreement raise questions as to Thompson's ability to effectively control day-to-day operations, which are not fully answered by Thompson's asserted manifestations of control. First, the agreement, as amended on September 8, 1988 (§ 4A.9, as amended), provides that Amcell will manage the Atlantic City system for 10 years with an option to extend the agreement for two additional five-year terms. Thus, although Thompson may have some theoretical right to terminate the agreement for violation of an implied covenant, there is no provision that gives Thompson routine discretion to review or terminate Amcell's management for as long as 20 years. This factor may undermine Thompson's ability to exercise control over day-to-day operations.

23. Second, the November 23, 1990 amendment to the management agreement (§ 1, § 4A.4, as amended) provides that day-to-day operations of the Atlantic City system will be administered by Wilmington Cellular Telephone Company (WCTC), which also operates Amcell's Wilmington system. This seemingly complete integration of management between the two systems raises questions as to Thompson's ability to exercise control of day-to-day operations, since Thompson presumably has no right to control WCTC's activities to the extent that they relate to the integrated Wilmington system.

3. Policy Decisions

24. *Comments.* Thompson and Amcell detail what they assert are indicia of Thompson's control over policy matters. They explain that Mr. Thompson: (1) selected Amcell to manage the facility and negotiated the terms of the agreement with Amcell; (2) must approve litigation undertaken by Amcell; (3) was involved in policy determinations involving roamer arrangements, establishment of a retail center, and the revision of rates; (4) has quarterly meetings with Amcell; (5) has independent FCC counsel and counsel/business adviser; (6) has been actively involved in all major decisions and is regularly informed of major developments; (7) with the advice of independent counsel, executes and approves all filings; (7) approves budgets, directs proceedings, oversees marketing and pricing; and (8) in some instances has countermanded decisions by Amcell.

25. TDS urges that Mr. Thompson's involvement in policy decisions does not establish that Thompson actually determines and carries out policies, in light of the broad responsibilities given Amcell under the management agreement. TDS also claims that Amcell controls Thompson's litigation decisions.

26. *Discussion.* Although Thompson presents evidence that Mr. Thompson has the final say, and thus determines, policy matters,⁶ we are troubled by a provision of the Thompson-Amcell Indemnity Agreement, dated December 30, 1987, which raises the possibility of Amcell's dominance. Section 1(c) of the agreement requires Thompson to "cooperate[] fully" with Amcell and gives Amcell "sole control" over the defense or settlement of any demand or claim subject to indemnification. These include claims arising from the Thompson-Amcell management agreement or the "filing by Amcell . . . of any petition, request or other pleading or matter with the FCC." Indemnity Agreement § 1. Although, as Thompson and Amcell point out, this provision relates only to certain litigation, that litigation is potentially highly significant to the Thompson-Amcell relationship.

27. We are concerned that this provision may reflect dominance in some policy matters by Amcell. In this regard, it tends to underscore the difficulty in evaluating, without further inquiry, the credibility of Thompson's claims that Mr. Thompson determines policy through the right to review and approve matters in which Amcell also has extensive involvement.

4. Personnel Responsibilities

28. *Comments.* Thompson and Amcell assert that Amcell's employees operate the Atlantic City system under a valid turnkey management agreement and that it is therefore appropriate for Amcell to handle the hiring, firing, and supervision of these employees. They observe that Thompson selected Amcell as its management company and negotiated the terms of the management agreement. They also observe that Thompson retained an independent FCC counsel and counsel/business adviser as well as Thompson's sole employee, Mr. Thompson. TDS responds that Thompson has no control over Amcell's employees.

29. *Discussion.* Our concern here is similar to our concern discussed in connection with day-to-day operations. Although Thompson's retention of independent counsel provides some evidence of control, the integration of personnel between the Atlantic City and Wilmington systems raises questions as to whether personnel actions will be made on Thompson's -- not Amcell's -- behalf. Given the integration of systems, it is far from clear that Mr. Thompson is "in charge" of personnel matters.

5. Financial Obligations

30. *Comments.* Thompson and Amcell maintain that Thompson has exercised financial responsibility consistent with the retention of control. They assert that Thompson negotiated and is solely liable for the \$1.85 million loan used to finance construction of the system and that Amcell has advanced no funds toward system construction or operation. They further assert that all expenses are paid from a separate Thompson bank account to which only Mr. Thompson has unrestricted access, that Thompson must sign all checks for non-recurring expenditures of over

⁶ We note in particular evidence that Mr. Thompson exercised control in specific matters. He states that he: (1) rejected a proposal by Amcell to sectorize two new cell sites to be constructed for the Atlantic City system (Declaration of Ellis Thompson, April 1, 1992 at 4); (2) personally, after his contract with Amcell, conducted discussions with TDS and its subsidiary regarding a reseller agreement and the purchase of resale cus-

tomers (*id.* at 3-4); (3) rejected terms of a lease for the Atlantic City systems retail sales and installation center and negotiated the relevant construction contract (*id.* at 2-3); and (4) disapproved a major agency agreement until Amcell provided a cost analysis justifying the agreement (Declaration of Ellis Thompson, August 20, 1991 at 2-3).

\$5,000 and all payments to Amcell, and that Amcell bills Thompson for its services and provides regular financial reports to Thompson.

31. TDS contends that Amcell was involved in obtaining the Thompson bank loan and that Amcell makes routine expenditures for the system. TDS claims that Amcell has advanced a large sum of money toward the purchase of the system and has agreed to indemnify Thompson if Thompson should lose its license.

32. *Discussion.* We are concerned that Amcell may have a degree of financial exposure which undercuts the significance of Thompson's formal responsibility for paying financial obligations. The May 22, 1990 amendment to the Thompson-Amcell Contingent Option Agreement (amendment ¶ 3, ¶ 4, as amended) calls for Amcell to pay Thompson, upon execution of the amendment, \$800,000 toward the option price of \$6 million. Thompson has made no equivalent out-of-pocket investment in the system. Under the Thompson-Amcell Indemnity Agreement, dated December 30, 1987 (¶ 1), Amcell agreed to reimburse Thompson for litigation expenses and to pay Thompson \$750,000 in the event that Thompson's application is denied as a result of execution of the management agreement or as a result of any matter filed by Amcell with the FCC. The September 8, 1990 amendment to the Indemnity Agreement and the Contingent Option Agreement requires Amcell to pay Thompson \$1.5 million if Thompson's authorization is revoked as a result of the amendment. These provisions suggest that, although Thompson is formally "in charge" of paying financing obligations, Amcell has actually assumed greater financial obligations than Thompson with respect to the system. Thus, Amcell rather than Thompson may have the true demonstrated financial stake in the system.

33. It also bears noting, in this regard, that there is evidence that Thompson did not negotiate the bank loan used to finance construction of the Atlantic City system "independently of Amcell," as claimed by Thompson. Thompson comments at 9. Although Mr. Thompson negotiated the \$1.85 million loan from the Provident Bank used to finance construction of the Atlantic City system, Amcell introduced Mr. Thompson to the bank, and the bank required, as a condition of the loan, that Amcell, with which the bank was familiar, manage the system. See Loan Agreement, February 15, 1989 at ¶ 5.1.9; Declaration of Anna E. Hillman (Amcell vice president), May 13, 1991 at 5; Declaration of David A. Lokting (Thompson attorney), May 10, 1991 at 1-3; Declaration of Ellis Thompson, May 16, 1991 at 4. After the provision was questioned, Thompson's lawyer persuaded the bank to modify the condition to permit the substitution of managers with the bank's consent. *Id.* This factor also tends to undermine the significance of Thompson's formally being "in charge" of paying financial obligations.

6. Receipt of Monies and Profits

34. *Comments.* Thompson and Amcell submit that all receipts go into an account controlled by Mr. Thompson and that Thompson receives a pro rata share of all profits. TDS claims the profits actually inure to the benefit of Amcell as the prospective owner of the system under the contingent option agreement. TDS notes that Amcell receives nine percent of gross revenues as a management fee.

35. *Discussion.* The evidence raises questions as to whether Thompson's legal right to receive 50.01 percent of profits reflects the true interests of Thompson and Amcell.

In particular, we are concerned by evidence which appears to contradict Thompson's claim that it is "entitled to and receives 50.1% of all profits." Thompson Comments at 10. (Emphasis added.) It appears that profits have been distributed only for the purpose of paying taxes and that the system's net income has otherwise been used to pay indebtedness, to reinvest in capital projects, and to maintain cash reserves. Letter from David A. Lokting to Interest Holders (Sept. 15, 1992) at 1-2.

36. The failure to distribute profits raises questions because, at one point, Mr. Thompson represented to the Commission that he was in the process of authorizing a distribution of profits to all interest holders. Declaration of Ellis Thompson, May 16, 1991 at 10. Mr. Thompson ultimately explained that he had cancelled the represented distribution because of pending litigation and uncertainty over the ownership interests in the licensee. Declaration of Ellis Thompson, November 24, 1992 at 3.

37. The circumstances, however, raise the possibility that the failure to distribute profits might be related to Amcell's expectation of imminently acquiring legal ownership of the system. Thompson and Amcell had formally applied for consent to the transfer of the system to Amcell by the time Mr. Thompson gave his explanation for not making the distribution. See File No. 08715-TC-01-92. Some circumstances suggest that Amcell's status as a prospective owner of the system, under the Contingent Option Agreement, was always a key factor in the Thompson-Amcell relationship. For example, under the CMS Settlement Agreement, Amcell had the right to disapprove the sale of the system to TDS or any other prospective purchaser. Letter from Sidney Aziz (Amcell) to Leroy Carlson (TDS) (Oct. 15, 1987). Moreover, by the May 22, 1990 amendment to the Contingent Option Agreement (¶ 3), Amcell undertook to make an immediate payment of \$800,000 toward the purchase price of the system. Thus, Amcell's evident expectation of acquiring ownership of the system and the failure to distribute any profits to Thompson raises a question as to whether Thompson expected to receive monies and profits from the operation of the system at all.

B. OVERALL SUMMARY

38. We find that the evidence before us discloses a pattern of circumstances which raises a substantial and material question as to whether Thompson permitted Amcell to become a real-party-in-interest in the application. See *Astroline Communications Company Limited Partnership*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988). We further find that our failure adequately to take into account these circumstances in our prior order rendered our *Intermountain* analysis there incomplete and erroneously led us to conclude that no substantial and material question existed. The relevant circumstances include: (1) Amcell's status as the prospective purchaser of the system; (2) the failure of Thompson to receive profits; (3) Amcell's substantial financial exposure; (4) Amcell's specific assumption of control over litigation related to its management; (5) Amcell's broad management responsibilities under a long-term agreement; and (6) the consolidation of the facilities and staff of the Atlantic City system and Amcell's operations in adjacent areas.

39. Although no single aspect of Amcell's participation, taken in isolation, necessarily establishes that it has control, the overall pattern could reasonably support a conclusion that, in the expectation of Amcell's acquiring legal control of the system, Thompson permitted Amcell to assume a

dominant position with respect to the system's affairs. The elements of the pattern, listed in the preceding paragraph, readily lend themselves to interpretation in that light.

40. We wish to emphasize that the questions raised by this case do not arise merely because the Atlantic City system is being operated pursuant to a turnkey arrangement. We are not suggesting that we expect cellular systems to be run as "mom-and-pop" operations or necessarily to be managed in the manner of broadcast stations. Rather, when we examine the totality of Amcell's involvement here, we find a substantial and material question as to whether Amcell's status as a prospective purchaser of the system with an independent interest in it predominates over its ostensible role as a turnkey manager answerable to Thompson.

41. Moreover, we do not discount the evidence proffered by Thompson tending to indicate that it retains control of the system. However, in view of the evidence as a whole, we find that sufficient doubt has been raised to warrant further inquiry in an evidentiary hearing as to the true relationship between Thompson and Amcell.

42. As we have done in prior cellular radio cases that have been remanded by the court, we will grant Thompson interim authority to continue to operate the Atlantic City system pending the completion of further proceedings. We find that there is a strong public interest in avoiding disruption of service to Ellis Thompson Corporation's customers. Moreover, we find that other applicants for the Atlantic City authorization, who would be subject to random selection procedures, would not be prejudiced by interim operation. See 47 C.F.R. § 22.32(g); *La Star Cellular Telephone Co.*, 4 FCC Rcd 3777 (1989), *aff'd*, 899 F.2d 1233 (D.C. Cir. 1990). See also *Metro Mobile CTS, Inc.*, 8 FCC Rcd 8675 (1993), *appeal pending sub nom. JAJ Cellular et. al v. FCC*, No. 94-1021 and consolidated cases (D.C. Cir. Jan.10, 1994); *Portland Cellular Partnership*, 8 FCC Rcd 4146 (1993), *appeal pending sub nom. Saco River Cellular, Inc. et al. v. FCC*, No. 91-1248 and consolidated cases (D.C. Cir. May 23, 1991).

VII. ORDERS

43. ACCORDINGLY, IT IS ORDERED, That, pursuant to the mandate of the Court of Appeals, the authorization issued to Ellis Thompson Corporation to construct and operate the Atlantic City, New Jersey cellular system IS RESCINDED.

44. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 309(e), the application of Ellis Thompson Corporation for facilities in the domestic public radio telecommunications service (File No. 14261-CL-P-134-A-86) IS DESIGNATED FOR HEARING upon the following issue:

To determine whether American Cellular Network Corporation is a real-party-in-interest in the application of Ellis Thompson Corporation for a cellular radio system on frequency Block A in Atlantic City, New Jersey and, if so, the effect thereof on Ellis Thompson Corporation's qualifications to be a Commission licensee.

45. IT IS FURTHER ORDERED, That the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent order.


46. IT IS FURTHER ORDERED, That American Cellular Network Corporation and Telephone and Data Systems, Inc. ARE MADE parties to this proceeding. The applicant and parties to this proceeding may avail themselves of an opportunity to be heard by filing written notices of appearance under 47 C.F.R. § 1.221(c), within 20 days of the mailing of this order by the Secretary of the Commission. The notice and other expedited procedures of 47 C.F.R. § 1.822(b), shall not apply to this proceeding.

47. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 309(e), Telephone and Data Systems, Inc. shall proceed with the initial presentation of evidence with respect to the issue designated above and that the burden of proof with respect to this issue shall be on Ellis Thompson Corporation.

48. IT IS FURTHER ORDERED, That the secretary shall cause a summary of this order to be published in the Federal Register.

49. IT IS FURTHER ORDERED, That Ellis Thompson Corporation IS GRANTED interim authority to operate the Atlantic City, New Jersey cellular system until a new license is granted and has become effective, and, if the licensee is not Ellis Thompson Corporation, any new licensee has given notice to Ellis Thompson Corporation and the Commission that it is ready to commence operation.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary